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SPURIOUS INTERPRETATION

The relation of law and morals has been said to be the Cape Horn of Jurisprudence.[1] In periods of civil development in which the law is expanding or developing through juridical speculation or some other non-legislative agency, this relation is a favorite theme of jurists. In periods of enacted law or among peoples with whom the growing-point of law is in legislation, it is apt to be passed over lightly, if not sneered at.[2] The analytical jurist looking at law from the standpoint of an imperative theory and taking legislation for his type of law, is perfectly clear; to him law is for the courts, morality is for the legislature.[3] So far as the division of governmental labor is complete, so far as the separation of judicial and legislative functions is carried out with logical exactness, this distinction is maintainable. But so far as the separation is incomplete and in the field, narrowing it may be, but by no means lost, in which judges must *make* as well as administer law, morality, under one name or another, must stand for the law which should in theory, but does not in fact, exist as the rule of decision. The philosophical jurist will call it natural law. The historical jurist will see in it a survival of, or reversion to, justice without law. The sociological jurist will style it "conformity to the *de facto* wishes of the dominant forces of the community."[4] And in truth it is all of these. It is reason asserting itself, where rules have left it unfettered, to bring about an exer-

[1] Ihering, quoted in Ahrens, Naturrecht, § 37. cf. Zweck im Recht, 2, 96.

[2] e. g. "This *alleged* but really nebulous relation between morality and law." Rattigan, Jurisprudence, § 4*a*.

[3] "This truth, when formally announced as an abstract proposition, is so simple and glaring that it seems idle to insist upon it." Austin, Jurisprudence, note to Lecture V.

[4] I am indebted to Mr. Justice Holmes for this apt formulation of the sociological view.

cise of individual judgment reflecting necessarily the views and desires of the dominant social force for the time being. The points of contact between law and morals, the points at which the individual reason and judgment of the judge, reflecting the desires of the dominant element of society, come into play, are three: discretion, judicial law-making, and interpretation.

Discretion, being confined to particular cases and held within very narrow limits, has no permanent or constructive influence on the law. Judicial law-making, as such, beongs to periods of juristic law, and in a period of enacted law is dormant. Interpretation, on the other hand, belongs to all periods and is an agency to which the most rigid of codes or constitutions, no less than the most settled juristic traditions, have been made to yield whenever growth has been necessary. Legislators and analytical jurists[1] have sometimes assumed that a perfection of statement was possible which would do away with all need for interpretation. But the last and best piece of code-making has left the whole matter of interpretation at large, and shows that the idea of tying down future generations by a complete and authentic extemporaneous exposition is waning.[2]

I have said that one of the points of contact between law and morals is to be found in interpretation. This is true to some extent of all interpretation. But it is more especially true of that form of interpretation—or rather that form of judicial law-making under the guise of interpretation—which Austin has styled "spurious interpretation."[3] The name given by Austin has been objected to as "depreciatory."[4] But the distinction is entirely valid, and deserves more attention than it has received. Nor is the depreciation of the process, involved in the name Austin applies to it, a sound objection. For if the process is not in fact what it pretends to be, but operates "by side winds and in underhand ways" to bring about results not attainable directly,[5] it is not merely destructive of clear legal thinking to use one term to cover both the genuine and the pretended, but in a time when we ought to have outgrown fictions, the pretended interpretation by virtue of which

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[1] See several instances noted in Lieber, Legal and Political Hermeneutics, Chap. II. §§ 12, 14.

[2] "Fur die Auslegung hat das Gesetzbuch keine besonderen Regeln aufgestellt." Bernhöft, das Bürgerliche Recht (in Birkmeyer's Encyklopädie) § 13.

[3] Jurisprudence (3 Ed.) 1028. See also Lect. XXXIII.

[4] Clark, Practical Jurisprudence, 235.

[5] Clark, Practical Jurisprudence, 235.

the law grows judicially, deserves to be so branded that no one shall be deceived. Austin's analysis will be found in the fragment of his Essay on Interpretation.[1] In substance, it is this: The difficulty calling for interpretation may be, (a) which of two or more co-ordinate rules to apply, or (b) to determine what the law-maker intended to prescribe by a given rule, or (c) to meet deficiencies or excesses in rules imperfectly conceived or enacted. The first two are cases for genuine interpretation. The third case, when treated as a matter of interpretation, calls for spurious interpretation.

The object of genuine interpretation is to discover the rule which the law-maker intended to establish; to discover the intention with which the law-maker made the rule, or the sense which he attached to the words wherein the rule is expressed. Its object is to enable others to derive from the language used "the same idea which the author intended to convey."[2] Employed for these purposes, interpretation is purely judicial in character; and so long as the ordinary means of interpretation, namely the literal meaning of the language used and the context, are resorted to, there can be no question. But when, as often happens, these primary indices to the meaning and intention of the law-maker fail to lead to a satisfactory result, and recourse must be had to the reason and spirit of the rule, or to the intrinsic merit of the several possible interpretations, the line between a genuine ascertaining of the meaning of the law, and the making over of the law under guise of interpretation, becomes more difficult. Strictly, both are means of genuine interpretation. They are not covers for the making of new law. They are modes of arriving at the real intent of the maker of existing law. The former means of interpretation tries to find out directly what the law-maker meant by assuming his position, in the surroundings in which he acted, and endeavoring to gather from the mischiefs he had to meet and the remedy by which he sought to meet them, his intention with respect to the particular point in controversy. The latter, if the former fails to yield sufficient light, seeks to reach the intent of the law-maker indirectly. It assumes that the law-maker thought as we do on general questions of morals and policy and fair dealing. Hence it assumes that of several possible interpretations the one which appeals most to our sense of right and justice for the time being is most likely to give the meaning of those who framed the rule.

[1] Jurisprudence (3 Ed.) 1023.
[2] Lieber, Legal and Political Hermeneutics, Chap. 1, § 8.

If resorted to in the first instance, or without regard to the other means of interpretation, this could not be regarded as a means of genuine interpretation. But inherent difficulties of expression and want of care in drafting require continual resort to this means of interpretation for the legitimate purpose of ascertaining what the law-maker in fact meant.

On the other hand, the object of spurious interpretation is to make, unmake, or remake, and not merely to discover. It puts a meaning into the text as a juggler puts coins, or what not, into a dummy's hair, to be pulled forth presently with an air of discovery. It is essentially a legislative, not a judicial process, made necessary in formative periods by the paucity of principles, feebleness of legislation, and rigidity of rules characteristic of archaic law. So long as law is regarded as sacred, or for any reason as incapable of alteration, such a process is necessary to growth, but surviving into periods of legislation, it becomes a source of confusion. Such survival, however, like the survival of fictions, of implications in law, and of such phrases as "constructive" trust[1] and constructive fraud, is inevitable in any system. While it is the chief means of growth in the formative period, in the period of growth by juristic speculation, which is the classical period in every legal system, it becomes a settled doctrine, and passes into succeeding periods of legislation as an undoubted judicial attribute.[2] As legislation becomes stronger and more frequent, examples of this type of so-called interpretation will finally become less common. Outside of constitutional law, where special reasons operate to keep it alive, the most conspicuous example in recent American case-law is the attempt in some jurisdictions to read into the statutes governing descent an exception excluding the heir who murders his ancestor,[3] a holding now generally repudiated.[4] None the less the genuine character of this so-called interpretation remains for the most part unquestioned. Jurists continue to discuss it as a form of interpretation *ex ratione*

[1] See the observations of Sir Frederick Pollock in his Law of Fraud in British India, 41.

[2] See Dig. 47, 8, 7. The writers on Roman law refer to interpretation *ex ratione legis* as "filling up blanks in the law." Salkowski, Institutionen (7 ed.) § 7. Compare the classical common law doctrine that the courts are to mold statutes "according to reason and convenience to the best use." Chitty's note to 1 Bl. Comm. 87.

[3] Riggs *v.* Palmer (1889) 115 N. Y. 506, Lundy *v.* Lundy (1895) 24 Can. S. C. 650.

[4] *In re* Kuhn (1904) 125 Ia. 449, McAllister *v.* Fair (1905) 72 Kan. 533, Shellenberger *v.* Ransom (1894) 41 Neb. 631, Owens *v.* Owens (1888) 100 N. C. 240, Carpenter's Estate (1895) 170 Pa. St. 203.

legis,[1] and courts confuse the two in one and the same sentence.[2]

Spurious interpretation is an anachronism in an age of legislation. It is a fiction.[3] Ihering has called the process, when applied in a period of growth by juristic speculation, "juristic chemistry."[4] Savigny, considering it with reference to the adaptation of authoritative texts to new circumstances, calls it "the correction of an incorrectly expressed law."[5] Lieber points out that it is essentially legislation.[6] Bryce calls it simply and plainly "evasion."[7] It is, in truth, what we may call a *general* fiction. For if we look narrowly at the fictions by means of which the law has grown in the past, we may divide them into general fictions—fictions under which a general course of procedure or general doctrines have grown up; and particular or special fictions—fictions which have enabled a new rule to grow up in particular cases. In the former class, along with spurious interpretation, one might put the *jus gentium*, natural law, and equity. Spurious interpretation, moreover, is a fiction which has done its legitimate work. Men have long seen that special fictions are unnecessary and unsuited to a developed system of law. But general fictions tend to become so deep-rooted, that eradication is well nigh impossible. Spurious interpretation and genuine interpretation are so generally confused by institutional writers, that few who study the law realize that there is any difference. The student is taught the principles of genuine and of spurious interpretation together as part of the *fundamenta* of law. So long as the bulk of a legal system is in the form of case-law, this is no great matter. When the growing-point shifts to legislation, and judicial law-making, being at variance with constitutional theory, is confined within con-

[1] The source of this confusion in modern books seems to be in Grotius (Bk II. Ch. 16 §§ 26, 27). See 1 Bl. Comm. 61, 62, Lieber, Legal and Political Hermeneutics, Ch. III, § 2, Cooley, Constitutional Limitations, 51 *et seq.*—"Certain statutes, where extension is not plainly excluded, may be extended beyond the letter to *similar and omitted cases*." Erkine, Principles of the laws of Scotland (19 Ed.) 18. See also Salmond, Jurisprudence, 134.

[2] Cf. People *v.* Com'rs of Taxes (1884) 95 N. Y. 554, 559.

[3] This appears most forcibly in archaic law, cf. the far fetched results drawn from texts of the Koran in Mohammedan Law. Wilson, Digest of Mohammedan Law (2 Ed.) 13.

[4] Geist des Römischen Recht (2 Ed.) III, 11.

[5] System, 1, § 37. "Korrektur des Wortes im Geiste des Interpreten." Dernburg, Pandekten, 1, § 35. Windscheid distinguishes *Analogie* expressly, although he deals with it under the general head of *Auslegung*. Pandekten, 1, § 23.

[6] Legal and Political Hermeneutics, Chap. II, § 15.

[7] Studies in History and Jurisprudence, I, 229.

stantly narrowing limits, it becomes a matter of the first importance, since it leads of necessity to exercise of legislative powers by the courts.

No one will assert at present that the separation of powers is part of the legal order of nature or that it is essential to liberty. We recognize to-day that it is a practical device, existing for practical ends; that it is only the principle of division of labor applied to government, and that it exists in modern states as a mere specialization, for the reason that any function will be better fulfilled by a special organ than by one charged with many functions.[1] It is often better that some other organ perform the special function in single instances, than that it go wholly unperformed. Just as in the organic body, when any one organ fails in its function others are pressed into service to do its work as well as they may, so in the super-organic body politic failure of one organ to do its whole work, or to do it well, puts pressure on the other organs to fill the gap. Hence, while invasion of the province of one department by another is by no means wholly evil, it is a sign either of backwardness in development or of organic disease. Rigid constitutions, difficult of amendment, particularly where, as in the case of the Fourteenth Amendment they seek to impose the political or economic views of one time upon all times to come, are presenting to modern common-law courts the same problem which the rigid formalism of archaic procedure, and the terse obscurity of ancient codes, put before the jurists of antiquity.[2] Cases must be decided, and they must be decided in the long run so as to accord with the moral sense of the community. This is the good side of spurious interpretation. It is this situation that provokes the general popular demand for judicial amendment of constitutions, state and federal, under the guise of interpretation.

Looking at the matter purely from the standpoint of expediency, and leaving legal theory out of account, the bad features of spurious interpretation, as applied in the modern state, may be said to be three: (1) That it tends to bring law into disrepute, (2) that it subjects the courts to political pressure, (3) that it reintroduces the personal element into judicial administration. Let us examine each of these propositions in more detail. In the first place, in a modern state, spurious interpretation of statutes, and especially of constitutions, tends to bring law into disrepute. Law is no longer the mysterious thing it was once. This is an age

[1] Bluntschli, Allgemeine Statslehre, Bk. VII, Chap. I.
[2] Cf. Bryce, Studies in History and Jurisprudence, I, 229.

and a country of publicity. It is no longer possible to impose upon the public by covering legislation with the cloak of interpretation. The people, when they call for spurious interpretation of constitutions and statutes, ask the courts to legislate, and understand exactly what they are asking. The disguise is transparent and futile, and can only result in creating or confirming a popular belief that courts make and unmake the law at will. Second, in a common-law country where questions of politics and economics are so frequently referred to the courts, the knowledge that courts exercise, or may exercise, a power of spurious interpretation subjects the courts to political pressure which can not but impair the general administration of justice. If the dominant political force for the time being may, or thinks it may, amend the constitution off-hand by procuring judicial spurious interpretation, it is evident that pressure is bound to be brought to bear upon the courts to adjust constitutional provisions to the exigencies of current policy. Of course this is to be apprehended to some extent wherever the doctrine of supremacy of law and a written constitution give the courts a certain political character.[1] But when it is known or believed that the courts will wield a legislative power, the danger is greatly aggravated. Popular feeling that courts make law, and hence that judges are political officers to be elected as such, is making more than one commonwealth realize Bacon's saying, "An ignorant man can not, a coward dares not be a good judge."[2] Finally, spurious interpretation reintroduces the personal element into the administration of justice. The whole aim of law is to get rid of this element. And, however popular arbitrary judicial action and raw equity may be for a time, nothing is more foreign to the public interest, and more certain in the end to engender disrespect if not hatred for the law. The fiction of spurious interpretation can not long deceive any one to-day. The application of the individual standard of the judge instead of the appointed legal standard is quickly perceived, and is, indeed, suspected too often where it has not occurred. If confidence in the regularity of judicial administration is impaired, laws are worth little. "The life of the laws lies in the due execution and administration of them."[3] In fact, lay advocates of spurious interpretation desire a reversion to justice without law. "If we examine their desire more closely we shall find that nothing less is demanded than

[1] As Mr. Dooley puts it, "the coort follows th' iliction rethurns."
[2] Works (Montagu's Ed.) 2, 378.
[3] Bacon, Works (Montagu's Ed.) 2, 378.

constructive justice, constructive laws, constructive verdicts, and constructive penalties, or, which is equally bad, the substitution of individual feelings and views for the general rule and even law."[1]

Are the temporary advantages to be derived from speedy judicial amendment of constitutions in any wise compensation for the serious and permanent injury to the legal system which is involved? Courts must decide cases; they must decide them in accord with the moral sense of the community so far as they are free to do so. If the proper agencies of government do not supply the necessary rules, they must administer justice without rules or must make rules. Granting this, the fact remains that there should be no such necessity, or at least it should be reduced to a minimum, in the modern state. Over-rigid constitutions, carelessly drawn statutes, and legislative indifference toward purely legal questions[2] are not permanently remedied by wrenching the judicial system to obviate their mischievious effects. As the sins of the judicial department are compelling an era of executive justice, the sins of popular and legislative law-making are threatening to compel a return to an era of judicial law-making. Both are out of place in a modern state.

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[1] Lieber, Legal and Political Hermeneutics, Chap. 2, § 16.

[2] It is instructive to note the indifference of legislatures, which are pouring out a huge volume of political statutes, toward defects in the law governing private acts and relations. Courts may point these out again and again, yet nothing is done to cure them. See two notes by Judge Irvine, 18 Green Bag, 466, and 19 Green Bag 317.